United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

76-1543

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1543

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P/S

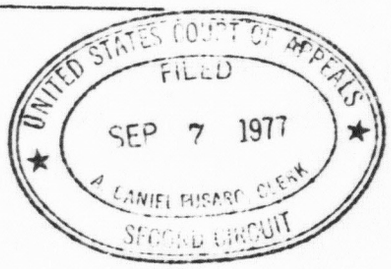
UNITED STATES OF AMERICA,

Appellant.

-against-

NICHOLAS ALBERTI,

Appellee.



PETITION FOR REHEARING

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(Of Counsel)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellant,

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-against-

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PETITION FOR REHEARING

The United States of America petitions for rehearing of the decision of this Court, entered on August 24, 1977, which dismissed its appeal from an order of the district court which set aside a judgment of conviction and ordered a new trial. The appeal was dismissed because the panel concluded that it was without jurisdiction to hear the appeal pursuant to T.18 U.S.C. §3731.

We are seeking rehearing because a recent opinion of the Supreme Court in Abney v. United States, ___U.S.___, 97 S.Ct. 2034, 2041 (1977), decided while the appeal here was sub judice, suggests that Section 1291, of Title 28, provides an alternative basis for the appeal from the order denying a new trial.

Section 1291 grants the federal courts of appeals jurisdiction to review "all final decisions of the district court", both civil and criminal. Abney v. United States, ___U.S.___, 97 S.Ct. at 2039. While it is true, as Judge Timbers observed

in his opinion here, that the right of the United States to appeal from an adverse decision in a criminal case is generally governed by the Criminal Appeals Act (18 U.S.C. §3731), the Supreme Court has held that in a small class of orders, which meet the requisite test of finality, as that term is used in Section 1291, the United States may appeal from an adverse ruling in a criminal case despite the limitations contained in 18 U.S.C. §3731. As Chief Justice Warren wrote in Carroll v. United States, 354 U.S. 394, 403-404 (1957):

> "It is true that certain orders relating to a criminal case may be found to possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders, and thus be appealable on the authority of 28 U.S.C. §1291 without regard to the limitations of 18 U.S.C. §3731, just as in civil litigation orders of equivalent distinctness are appealable on the same authority without regard to the limitations of 28 U.S.C. §1292. The instances in criminal cases are very few. *** In such cases, as appropriate, the Government as well as the moving person has been permitted to appeal from an adverse decision" [emphasis supplied].__/

__/ Of course, Section 1291 contains no limitation against appeals by the United States in criminal cases if the criteria there set forth have been met. Moreover, Section 3731, which in the broadest possible terms authorizes appeals from orders terminating prosecutions and suppression orders, contains no prohibition against other appeals pursuant to Section 1291. Nor does the legislative history indicate any such intent. Sen. Rep. No. 91-1296, 91st Cong., 2nd Sess, p. 18 (1970). Indeed, the notion that "appeals by the Government, in criminal cases are something unusual, exceptional [and] not favored", upon which resistence to appeals by the United States was previously founded (Carroll v. United States, 359 U.S. at 399), surely no longer reflects present practice. Such appeals, even from truly interlocutory orders of the kind at issue in Carroll, are now appealable; indeed, as Judge Timbers recognized here (Slip op. 5510), Congress expressly indicated its displeasure with the approach reflected by this "axiom" by placing a rule of liberal construction right "on the face of Section 3731". S. Rep. No. 91-1296, 91st Cong., 2nd Sess., p.18.

The significance of the holding in Abney v. United States, ___U.S.___, 97 S. Ct.2034 (1977) is the new gloss which it placed on the language of Section 1291. There the issue was whether a defendant could appeal from an order denying a motion to dismiss the indictment on the grounds that the trial which he sought to avoid would place him in jeopardy a second time. The Supreme Court held that the order was "final" within the meaning of Section 1291 even though it did not terminate the proceedings and "lack[ed] the finality traditionally considered indispensable to appellate review" (97 S.Ct. 2040).

The Supreme Court isolated three considerations which were significant in arriving at that conclusion. Chief Justice Burger, writing for the Court, began by observing that the order in Abney certainly met the "threshold requirement" of finality since there could be no doubt that the order "constitute[d] a complete, formal and, in the trial court, a final rejection" of the defendant's double jeopardy claim. There were simply no "further steps" that could be taken in the district court "to avoid the trial the defendant maintains is barred by the Double Jeopardy Clause" (97 S.Ct. 2040).

Moreover, the Chief Justice continued, "the very nature of the defendant's double jeopardy claim is such that it is collateral to, and separable from the principal issue at the accused's impending trial, i.e. whether or not the accused is guilty of the offense charged". The elements of his claim,

in short, "are completely independent of his guilt or innocence" (97 S.Ct. 2040).

Finally, the Chief Justice observed, the right which the defendant asserted to avoid the trial "could be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence" (97 S.Ct. 2041).

These considerations, we respectfully submit, are equally applicable here where the United States seeks to avoid the unnecessary expenditure of limited judicial and prosecutorial resources on a second trial of the same offense. Surely, the "threshold requirement of a fully consumated decision" (97 S.Ct. 2040), has been met by the order granting a new trial. There is simple "no further steps" that can be taken in the district court to avoid the second trial, which the United States maintains was ordered contrary to law.

Moreover, here as in Abney, the very nature of the claim upon which the district court entered the order requiring the second trial, the alleged exposure of the jury to prejudicial publicity, is "collateral to, and separable from the principal issue at the accused's impending trial, i.e. whether or not the accused is guilty of the offense charged" (97 S. Ct. at 2040). Here, as in Abney, "the matters embraced in the trial court's pretrial order here are truly collateral to the criminal prosecution itself, in the sense that they will not 'affect, or *** be affected by, decision of the merits of the case'" (97 S. Ct. 2034).

Finally, the right which the United States seeks to vindicate here, will be thoroughly lost if appellate review is denied here. Indeed, this fact alone was sufficient for the Supreme Court to hold that a state court order, reversing a judgment of conviction and ordering a new trial was "final" for purposes of its own appellate jurisdiction under 28 U.S.C. §1257. California v. Stewart, 384 U.S. 436 (1964). [1] There the Supreme Court of California reversed a judgment of conviction and ordered a new trial on the ground that a confession had been improperly admitted into evidence. The State of California then filed a petition for a writ of certiorari which was granted. In explaining its reasons for denying a motion to dismiss the writ, the Supreme Court said (384 U.S. at 498, n.71):

> "After certiorari was granted in this case, respondent moved to dismiss on the ground that there was no final judgment from which the State could appeal since the judgment below directed that he be retried. In the event respondent was successful in obtaining an acquittal on retrial, however, under California law the State would have no appeal. Satisfied that in these circumstances the decision below constituted a final judgment under 28 U.S.C. §1257(3) (1964 ed.), we denied the motion. 383 U.S. 903.

Here, as in California v. Stewart, if the defendant is successful in obtaining an acquittal on retrial, the Double Jeopardy Clause would bar any appeal challenging the propriety of the retrial. Moreover, while the statute at issue in Stewart was 28 U.S.C. §1257, rather than 28 U.S.C. §1291, the Supreme

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[1] The case is one of three decided along with Miranda v. Arizona.

Court plainly indicated that it regarded decisions construing 18 U.S.C. §1257 as persuasive authority in construing the similar provisions of 28 U.S.C. §1291 (97 S.Ct. 2040 and n.5).

We submit, in sum, that an order of the district court, setting aside a guilty verdict, and ordering a new trial on grounds wholly unrelated to the defendant's guilt or innocence, is sufficiently collateral, and possesses the indicia of finality, "to be appealable on authority of 28 U.S.C. §1291, without regard to the limitations of T.18 U.S.C. §3731" (Carroll v. United States, 354 U.S. at 403-404).

CONCLUSION

The petition for rehearing should be granted and the appeal should be determined on its merits.

Dated: September 6, 1977.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

RITA BLOOM, being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 7th day of September 1977 she served a copy of the within

Petition for Rehearing

by placing the same in a properly postpaid franked envelope addressed to:

Cohen & Swados, Esqs.
70 Niagara Street
Buffalo, New York 14202

and deponent further says that she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 CADMAN PLAZA EAST ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Rita Bloom

Sworn to before me this
7th day of September 1977.

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1979